



## **BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.**

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### **Opinion Below.**

The United States Circuit Court of Appeals for the Fourth Circuit rendered its original opinion in this case on April 11, 1944. The opinion is reported in 142 Fed. (2d) 824, and is set forth on pages 71 to 77 of the Record.

Subsequently, a petition for rehearing having been filed, the Circuit Court rendered a supplemental opinion on May 31, 1944, denying the petition. The opinion is reported in 142 Fed. (2d) 828, and is set forth on pages 91 to 93 of the Record.

### **Jurisdiction.**

The judgment to be reviewed was entered by the Circuit Court of Appeals for the Fourth Circuit on April 11, 1944 and rehearing was denied on May 31, 1944. A writ of certiorari is asked under Section 240 of the Judicial Code (Act of March 3, 1911 c. 231, § 240, 36 Stat. 1157 as amended February 13, 1925, c. 229, § 1, Stat. 938).

### **Statement of the Case and Questions Presented.**

For a statement of the case and of the questions presented see page 1 through 8 above.

### **Specification of Errors.**

The Circuit Court of Appeals for the Fourth Circuit erred:

1. In reversing the judgment of The Tax Court of the United States in this cause.

2. In not affirming the judgment of The Tax Court of the United States in this cause.

3. In denying the petition for rehearing in this cause.

4. In finding that the future interests transferred by petitioner into trust were of such a computable or ascertainable value as to be subject to the gift tax (Revenue Act of 1932 as amended).

5. In finding that Article "Eleventh" of the Trust Indenture executed by petitioner on January 13, 1939 was contrary to public policy.

6. In not finding that the future interests transferred into trust by petitioner for the benefit of his children are so vague, conditional, contingent and speculative as to have no computable or ascertainable value by any actuarial or other recognized method and therefore are not subject to gift tax.

7. In not finding that Article "Eleventh" is a valid condition precedent to the validity and effectiveness of the trust, the effect of which when fulfilled is to preclude any liability for gift tax based upon the execution of such Trust Indenture.

## ARGUMENT.

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### I.

#### **The Alleged Gift was without Computable or Ascertainable Value and was therefore not subject to Gift Tax.**

As shown above, petitioner's interest under the Harley T. Procter trust *inter vivos* is a contingent remainder, not a vested remainder, the contingency being that petitioner must survive his mother before he takes any interest whatsoever in the corpus of the *inter vivos* trust of a value of \$928,593.70. See Gray, "The Rule against Perpetuities," 3rd Ed. 1915, Sec. 108. "On a devise to A for life his remainder to such of his children as survive him, remainder is contingent." *Riddle v. Killian*, 366 Ill. 294, 303, 8 N. E. (2d) 629, 633.

Petitioner's interest under the testamentary trust appears to be a vested remainder subject to divestment. The divestment is to occur either (a) if he fails to reach the age of 40 years, or (b) if he fails to survive his mother.

It is the position taken by the Circuit Court of Appeals in its two opinions that the stipulated actuarial factors make it possible to compute not only the value of petitioner's remainder interests under the Harley T. Procter trusts, but also the value of that portion thereof which petitioner transferred to his children by the Trust Indenture of January 13, 1939.

However, petitioner's remainder interests were pledged to secure his \$686,300.03 demand promissory notes held

by his mother; and the Trust Indenture of January 13, 1939 specifically provided that petitioner transferred the trustees under the Trust Indenture *only so much* of his remainder interests under the Harley T. Procter trusts "as will remain (a) *after the satisfaction and payment of the indebtedness to Lillian S. Procter represented by the aforementioned seven notes.*"

Thus the gift in this case was subject to be taken from both the donor and the donees (a) by foreclosure of the notes or by the fall of the market value of the corpus of the remainders below petitioner's indebtedness, as well as (b) by petitioner's failure to survive his mother. It must be admitted by respondent, as well as by the Circuit Court of Appeals, that *there is no actuarial or other method by which these future interests conveyed under the Trust Indenture can be computed or ascertained by any actuarial or other "recognized method."*

For "although actuarial science may have made great strides in appraising the value of that which seems unappraisable" (to quote from Mr. Justice Black in the *Robinette* case, as we show below), it is an utter impossibility to value the gift in this case *subject to* the pledge of the remainders to secure the \$686,300.03 of *demand* promissory notes, which, assuming their validity, may not become due or be paid for an indeterminable period.

The Circuit Court in its opinion says that "under the decision in the *Shaughnessy* case, this distinction (*i. e.*, whether the remainders conveyed were vested or contingent) is immaterial" (R. 75). The reference here is to *Smith v. Shaughnessy*, 318 U. S. 176. But in the *Shaughnessy* case the taxpayer, according to Mr. Justice Black's opinion, "made an irrevocable transfer in trust of 3,000

shares of stock worth \$571,000" (R. 84). In other words, the donor in the *Shaughnessy* case was *the absolute owner* of the full title to the property which he conveyed into trust. His interest was the equivalent of a "fee simple absolute" in land. He did not own merely a contingent remainder therein (the trust *inter vivos*) nor a vested remainder subject to be divested (the testamentary trust) and much more importantly, he did not make his conveyance subject to the prior pledge of the 3,000 shares of stock as collateral security to his demand indebtedness of \$686,300.03, as did petitioner in the case at bar.

There is therefore nothing parallel between the *Shaughnessy* case and the case at bar *upon the facts*; and the *Shaughnessy* case did *not* hold that the donor of an interest which cannot be ascertained or computed by any actuarial or other recognized method is subject to the gift tax.

Turning to the case of *Robinette v. Helvering*, 318 U. S. 184, we find language by Mr. Justice Black which we submit is squarely in conflict with the two opinions of Mr. Justice Parker in the case at bar. In the *Robinette* case, exactly as in the *Shaughnessy* case, the property owned by the donor was owned in absolute ownership, the property being worth \$193,000 and \$680,000. Mr. Justice Black had to decide whether an admittedly taxable future interest created in this property was to be "cut down" by virtue of an interest therein *which he said was so conditional and speculative as to be impossible of valuation by any known actuarial means*. Mr. Justice Black said:

"In this case, however, the reversionary interest of the grantor depends not alone upon the possibility of survivorship (of the life tenant, the daughter) but also upon the death of the daughter without issue who should reach the age of 21 years. The petitioner does

not refer us to *any recognized method by which it would be possible to determine the value of such a contingent reversionary remainder*. It may be true as the petitioner argues that trust instruments such as these before us frequently create 'a complex aggregate of rights, privileges, powers and immunities and that in certain instances all these rights, privileges, powers and immunities are not transferred or released simultaneously.' But before one who gives (t)his property away by this method is entitled to deduction from his gift tax on the basis that he had retained some of these complex strands it is necessary that he at least establish the *possibility of approximating what value he holds*. Factors to be considered in fixing the value of this contingent reservation as of the date of the gift would have included consideration of whether or not the daughter would marry; whether she would have children; whether they would reach the age of 21; etc. *Actuarial science may have made great strides in appraising the value of that which seems to be unappraisable, but we have no reason to believe from this record that even the actuarial art could do more than guess at the value here in question. Humes v. United States, 276 U. S. 487, 494.*" (Italics added.)

Petitioner submits that Mr. Justice Black here in effect correctly holds that there may exist such speculative and conditional rights and interests that no actuarial value nor, indeed, any other value by "any recognized method" can be assigned to them, even though they may be the subject of a valid transfer or conveyance. Mr. Justice Black, we submit, is here further correctly deciding that property which has no ascertainable or computable value by any recognized method must be ignored for gift tax purposes.

While it is true enough that in the *Robinette* case Mr. Justice Black held that such an unascertainable and uncomputable interest could not be used to "cut down" a

gift tax otherwise due, because that is the way in which the question presented itself to him in the *Robinette* case, nevertheless the converse must be equally true, *i. e.*, that an interest which is so vague, conditional, contingent or speculative as to be without any possible valuation by any actuarial or other "recognized method" cannot be made the subject of a gift tax. This, we submit, is the situation in the case at bar.

If the daughter (the donor) in the *Robinette* case had conveyed \$873,000 worth of property into trust, the *income* to be payable to her issue *provided* (1) that she be married, (2) that she was able to have children, (3) that she actually bore the children, and (4) that the children lived to the age of 21 years, at the same time retaining for herself the full reversion and remainder in the trust fund, would such a conveyance be subject to the gift tax? Clearly under the language of Mr. Justice Black's opinion in the *Robinette* case it would *not*, because it could have no ascertainable or computable value. This, we submit, is the correct result and is conclusive in favor of petitioner in the case at bar.

Indeed, we feel that the instant case is of vast significance because *it is the first case in the history of the gift tax law*, so far as we know, in which a donor of *such a vague interest that it cannot be valued* has been held subject to a gift tax. Merely because petitioner conveyed a "contingent remainder" *to his children under the Trust Indenture of January 13, 1939 out of such a contingent and speculative interest under the Harley T. Procter trusts*, would not render it *more* taxable.

It is of course true, as Mr. Justice Black says in the *Shaughnessy* case, that "For many years Congress has sought vigorously to close tax loopholes against ingenious

trust instruments," adding, "The language of the gift tax statute, 'property . . . real or personal, tangible or intangible,' is broad enough to include property, however conceptual or contingent." But Mr. Justice Black is here applying this language to the *donee's interest* in the property given and received under the terms of the gift, and not to the *donor's interest*. No matter how earnestly Congress has sought 'to close tax loopholes against ingenious trust instruments,' it was never intended to tax a gift which had no ascertainable or computable value by any actuarial or other "recognized method."

Petitioner submits that this question is of the very greatest importance and that the Circuit Court's opinions in this case should not be allowed to stand without a review by this Court. Where, as in the case at bar, the interest conveyed by the donor is subject to Federal estate tax upon petitioner's death, *the gift tax should not be imposed upon the transfer in trust of property which has no ascertainable or computable value at the time of the gift.*

## II.

### **Article "Eleventh" of the Trust Indenture is not Void as Against Public Policy.**

The Circuit Court of Appeals condemns Article "Eleventh" of the Trust Indenture of January 13, 1939 as "contrary to public policy for three reasons: In the first place, it has a tendency to discourage the collection of the tax by the public officials charged with its collection, since the only effect of an attempt to enforce the tax would be to defeat the gift. In the second place, the effect of the condition would be to obstruct the administration of justice by requiring the courts to pass upon a moot case . . . . In the third place, the condition is to the effect that the final

judgment of a court is to be held for naught because of the provision of an indenture necessarily before the court when the judgment is rendered" (R. 76-7).

It is petitioner's position that there is no validity to any of these grounds for condemning Article "Eleventh" as contrary to public policy, but that on the contrary Article "Eleventh" is perfectly valid and enforceable as a condition precedent to the effectiveness of the transfer into trust. Before considering the three grounds stated by the Circuit Court, we wish to cite some of the authorities supporting such a condition precedent.

The common law courts have unanimously and invariably given full effect to a condition nullifying and voiding a transfer where the intention so to do is clearly expressed in the document.

*Mayer v. Am. Sec. & Tr. Co.*, 222 U. S. 295;

*Boehme v. Fraase*, 291 Ill. 571;

*Rankin v. Dean*, 47 So. 1015;

*Spinks v. First Christian Church*, 273 S. W. 815;

*Duell v. Leslie*, 106 S. W. 489;

*Emery v. Dana*, 84 Atl. 976.

Against these cases respondent took the position that the condition precedent therein was void as repugnant to the gift. By the overwhelming weight of authority, however, an instrument of transfer, which contains two clauses which appear to be inconsistent, is invariably sustained where any possible construction can be given thereto which would not make them repugnant and void. Under this doctrine all such clauses as Article "Eleventh" are construed to be conditions limiting the effect of the transfer itself. In other words, the courts will invariably adopt that construction of the instrument which will give validity to both

provisions if possible, and particularly where the second clause can be held to be merely a condition precedent to limit the prior transfer.

*Reuter v. Reuter*, 218 N. W. 86;

*Iowa Farm Credit Corp. v. Halligan*, 241 N. W. 475;

*Ogletree v. Abrams*, 67 S. W. (2) 227;

*Hansen v. Bacher*, 299 S. W. 225;

*Associated Oil Co. v. Hart*, 277 S. W. 1043;

*Shugart v. Shugart*, 233 S. W. 303; 248 S. W. 328;

*Hughes v. Gladewater*, 76 S. W. (2) 471;

*Word v. Kuykendall*, 246 S. W. 757;

*Grogan v. City of Brownwood*, 214 S. W. 532.

Many other similar cases could be cited from practically every common law jurisdiction.

The merest glance at Article "Eleventh" shows that it is a condition precedent to the creation of the trust and limits the transfer to the trustees therein. For if the condition be fulfilled, then that part of the transfer subject to the condition "shall automatically be deemed" to be excluded from the transfer and to "remain the sole property" of petitioner "free of the trust hereby created."

This is the classic language of a condition precedent. Since the gift tax arises at the very date of execution of the instrument, if it arises at all, and since the word "automatically" is inserted to limit the effect of the transfer, and since, finally, Article "Eleventh" specifically precludes the property described under the conditions named from forming part of "the trust hereby created," it necessarily follows that no transfer could take place until the condition of non-taxability is fulfilled.

There is no repugnance between a condition precedent and words of outright transfer, nor is there any reason why a donor cannot limit his transfer by any condition precedent which he (the donor) shall determine. The trust instrument in this case is by its terms executed merely for love and affection. The donor had, on the date of the execution of the instrument, *the fullest and completest conceivable right to insert any condition precedent to the effectiveness of the trust which he might elect in his unfettered discretion.*

This condition is not a condition subsequent rather than a condition precedent, merely because it takes effect after the date of the alleged transfer. Every condition precedent must take effect after the date of the instrument in question; and since in this case the condition was precedent to the passage of the interest into trust, it is a condition precedent and is not a condition subsequent to divest the trustees of such interest.

Turning now to the issue of public policy, we discuss each of the three grounds for the Circuit Court's holding that the condition contained in Article "Eleventh" is contrary to public policy, as follows:

1. The Circuit Court maintains that Article "Eleventh" "has a tendency to discourage the collection of the (gift) tax by the public officials charged with its collection, since the only effect of an attempt to enforce the tax would be to defeat the gift." (R. 76.)

We submit, however, that if this were a valid criticism of Article "Eleventh," *no donor could ever make a conditional gift* without being subject to the ruling that for gift tax purposes the condition, if effective and fulfilled, would

prevent the collection of the tax, and therefore the condition was contrary to public policy.

Expressed in this manner it is obvious that there is no foundation to this ruling by the Circuit Court in this case. *A donor has, under our system of private property, an unrestricted right to make any conditional gifts he wishes.* If he wishes to provide that the gift shall not be effective upon any contingency, no matter how speculative, this is his right; and the condition will not be stricken down for gift tax purposes merely because, if the condition is performed, the gift tax cannot then be collected *because the "gift" has "automatically" failed.*

2. The Circuit Court's second argument is that Article "Eleventh" would "obstruct the administration of justice by requiring the courts to pass upon a moot case," citing *Lord v. Veazie*, 8 How. 257, and *Van Horn v. Kittitas County*, 112 Fed. 1 (R. 76).

We submit that there is nothing moot whatever about the issue in this case. On the contrary, it represents a *genuine controversy* over a gift tax which respondent claims should be levied in the sum of \$36,487.85, and which petitioner denies is validly due.

The *Veazie* case involved an appeal to the Supreme Court from a consent decree, to which all of the parties had united in the trial court for the ulterior motive of affecting other persons not parties to the litigation. Mr. Chief Justice Taney quite properly held that this was an improper use of the judicial process. But who can say that there is the slightest analogy or similarity between that case and the case at bar?

As for the *Kittitas* case, it is a decision rendered by the Circuit Court for the Western District of Washington in 1901, and was neither appealed nor has it ever been cited in any other court. The decision in that case was that a contract, which required litigation of a moot case in another court, could not be lawfully enforced in a second proceeding, because such a contract is "entirely void." Obviously the case at bar does not involve a contract or conveyance which requires the prosecution of a moot case through another court.

It is true enough that in the case at bar not only is the amount of the gift tax to be determined, but also the issue as to whether *any gift tax is due* must also be settled. The Circuit Court of Appeals says that the latter question of the validity of the gift can only be determined "between the donor and persons not before the Court." But controversies regarding gift taxes (and income taxes) between taxpayers and the Commissioner of Internal Revenue arise and are litigated in our courts every day, without third parties, who are not involved in the payment of the tax, being before the Tax Court. Very frequently the determination of whether a gift tax is due involves the validity and effect of transfers to third persons who are not parties to the tax litigation. Indeed, this is the standard situation in all gift tax controversies, except in the rare instance where the Commissioner is seeking to collect the tax from the donee. Such litigation is not moot.

Until the decision by the Circuit Court in the case at bar, no one ever said that the validity of a gift and the interpretation of a condition precedent in a transfer alleged to be subject to the gift tax presented a moot case because the donee was not a party to the tax proceedings.

3. The Circuit Court's third ground for holding Article "Eleventh" contrary to public policy is that Article "Eleventh" "could not be given the effect of invalidating a judgment which had been rendered when the instrument containing the condition was before the court, since all matters are merged in the judgment. To state the matter differently, the condition is not to become operative until there has been a judgment; but after the judgment has been rendered it cannot become operative because the matter involved is concluded by the judgment." (R. 77.)

This begs the whole issue; for it *assumes* that a *valid* judgment levying the gift tax is *first* rendered, and argues that, *after such a valid judgment has been rendered*, "the matter" (*i.e.*, the liability for gift tax) "is concluded by the judgment." But petitioner here denies that a valid judgment for the gift tax has been, or can be, rendered *in the first place, because that is the very condition precedent to the taking effect of the gift itself.*

Why does it so shock the Circuit Court that *an ineffective effort* to make a gift has been attempted here, and that it must find that *the gift itself has failed*? Many another transfer of property has been attempted by the owner, but has been held ineffective, and therefore not subject to taxation. Let us suppose a taxpayer attempts to sell property at a taxable profit, but in a tax proceeding it plainly appears, as here, that the "sale" is void or otherwise ineffective. May the tax court by judicial fiat transform the invalid "sale" into a valid transfer *on grounds of "public policy," in order to enable the taxing authorities to collect a tax ? Obviously not.*

It certainly can make no difference that the *transferee* of the property, whether a "gift" or a "sale" be under

consideration, is not "concluded by the (tax) judgment," for under our Federal law, the question of tax liability is to be determined *only between the taxpayer and the Commissioner*. No Federal taxing statute has ever provided that if an attempted, but ineffective, "sale" or "gift" is made, a tax may be collected thereon merely because the alleged "buyer" or "donee" is *not a party to the tax case*. If the Circuit Court in this case intends to add this provision to the taxing statutes, it can only do so by what amounts to "judicial legislation." No argument about "public policy" can, we submit, justify this result.

Let us assume that petitioner had inserted the provision that the transfer into trust would be ineffective as to any property subject to general real estate taxes in the State of New York. Let us next assume that, in spite of the taxpayer's legal advice to the contrary, one parcel of such real estate in New York was subject to general real estate taxes. There surely would not be the slightest ground for any court holding that such a condition precedent was ineffective merely because the condition defeated the transfer of the particular property found to be subject to such taxation.

Article "Eleventh" merely amounts to the taxpayer saying in effect: "As I understand the gift tax law on the date of this instrument, my understanding being based upon the advice of my counsel, there are no gift taxes due

from me by virtue of all or any part of this transfer; but if for any reason my counsel should be wrong and this transfer in trust should be held subject to gift tax by a court of final appeal, then and in that event the transfer into trust aforesaid shall be subject to the condition that

all or so much of the property so taxed shall not form a part of such transfer, but shall automatically be and remain my own property as though this instrument had never been executed."

Surely if the right of private property exists under our law, an owner of property can make his wholly voluntary transfer thereof subject to any conditions precedent which he as owner of such property may desire. If one of such conditions is that the donor shall not be liable to pay a tax which the donor has no willingness to pay, that is a matter of which neither the donee nor the Commissioner can complain. We repeat that *there is no public policy in favor of compelling donors to make unconditional gifts so as to aid the public Treasury*. Yet this is the whole substance of the criticism of Article "Eleventh" by the Circuit Court of Appeals.

A petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit in this case is therefore respectfully prayed, to the end that the judgment of the Circuit Court may be reversed and the decision of The Tax Court of the United States affirmed.

Respectfully submitted,

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